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Supreme Court, U.S.
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IN THE UNITED STATES SUPREME COURT

October Term 1982

No. _____

LILLIAN R. LEWIS,

Petitioner,

vs.

CENTRAL PIEDMONT COMMUNITY COLLEGE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a determination that a successful applicant is better qualified than the minority plaintiff in an employment discrimination case can be determinative as a matter of law on the question of discrimination, where the district court has found as a fact that the employer's articulated explanation of superior qualification is pretextual.

2. Whether a Court of Appeals, in applying the clearly erroneous rule, of Rule 52, F.R.Civ.P., in reversing a finding of discrimination, must discuss in what way the subsidiary facts supporting a finding of discrimination are clearly erroneous.

3. Whether, the clearly erroneous rule of Rule 52, F.R.Civ.P., precludes the Court of Appeals from making factual

determinations of credibility, motivation and inferences, and requires that the case must instead be remanded to the district court for further findings.

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OPINION BELOW

The opinion of the Court of Appeals is reported at 689 F.2d 1207 (4th Cir. 1982) and appears in the Appendix to this Petition, at A-30. The opinion of the district court is not officially reported. It appears in the Appendix at A-1.

JURISDICTION

The Judgment of the Court of Appeals for the Fourth Circuit was entered on October 4, 1982. A petition for rehearing was denied on October 28, 1982. This petition for certiorari is filed within 90 days of the order denying the petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

42 U.S.C. § 1981:

All persons within the jurisdiction

of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

This is an action brought under the Civil Rights Act of 1866, 42 U.S.C. § 1981, alleging that petitioner Lillian R. Lewis, plaintiff below, was denied in September 1975 a position as accounting lab instructor at respondent Central Piedmont Community College be-

cause of racial discrimination. The district court had jurisdiction under 28 U.S.C. § 1343(a)(4).

The district court, after a non-jury trial, found that the respondent's articulated explanation for selecting Emily Roberts, the white applicant who received the job, was pretextual and that petitioner, who is black, was better qualified for the position than Roberts. A-11-12. The district court awarded plaintiff relief in the form of back pay and an injunction against discrimination in the future.[1/]

Petitioner graduated from college

1/ Because petitioner was promoted in 1978 to a position that paid more than the accounting laboratory position, she did not seek an injunction awarding her to that position.

with a bachelor's degree in economics in 1964. She was employed by the respondent in 1966 in its business office and has continued in that employment since. During this period, petitioner performed a wide range of accounting-related functions, even though she was not an accountant. A-3-5.

In September 1975, respondent advertised in an internal, employee newsletter the availability of the lab position in the Accounting Department. The only job qualifications specified, were "an associate degree in accounting or work experience equivalent." The position involved working with basic level accounting students, who completed problems assigned by classroom instructors. The lab instructor did not grade the problems. The lab instructor supervised and assisted the

students in the lab and worked with the audio-visual equipment. Lab work was not required for students beyond the basic courses, and students enrolled in courses beyond the basic courses rarely used the accounting lab. A-6.

Petitioner was interviewed by Herb Burns, chairman of the Accounting Department. During the interview, Burns discussed with petitioner the number of years since she had taken academic accounting courses. Burns was satisfied that petitioner's taking additional courses if she were selected would sufficiently refresh her academic qualifications. A-7.

Burns recommended petitioner for the position. His recommendation was ordinarily tantamount to selection. No other person interviewed the applicants.

Nonetheless, Burns' recommendation was subsequently overruled by some as-yet unidentified person in the respondent's hierarchy. The respondent has never articulated any explanation why or by whom the recommendation was overruled or withdrawn. A-8.

Following the withdrawal of the recommendation of petitioner, Burns recommended Roberts for the position. Roberts had only graduated from high school one year earlier in 1974 and had since graduating from high school been enrolled in respondent's accounting program. She was to graduate with an associate degree in accounting in October 1975, but did not have the minimum qualifications in the form of a degree when she was selected. She had had no practical work experience in dealing with any accounting principles.

A-8-9.

Burns denied at trial any recollection of making any recommendation prior to recommending Roberts, but a memorandum that he prepared in 1975 referred to an earlier recommendation and stated that he had not considered Roberts for the position at that time because he was under the impression that she could not be considered. Respondent asserted at trial, by way of argument of counsel, that this impression arose out of a misapprehension that a policy against nepotism precluded her from being considered. However, Burns testified that he did not believe that the nepotism policy ever precluded

Roberts from being considered.[2/]

Following Roberts' selection, respondent's personnel officer questioned the selection procedure. A Dr. Travis, who was Burns' superior, prepared a memorandum giving three reasons for choosing Roberts over petitioner. When the personnel officer indicated that two of the three reasons were "not accepted," Travis accommodated by providing a second memorandum which omitted the offending reasons and con-

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2/ The decision of the Court of Appeals erroneously states that Burns testified that the nepotism rule was the reason that he did not consider Roberts. A-40. There is simply no evidence to support that finding, and the district court made findings to the contrary, when it found tha the respondent had not explained the withdrawal of the initial recommendation.

formed to the personnel officer's expectations as to what constituted an acceptable reason. A-10-11.

Respondent's personnel policy gave incumbent employees such as petitioner a preference over non-employees in filling job vacancies. Although Roberts had worked for respondent as a typist, it was only in connection with a student work-study program, which did not qualify her as an employee entitled to the preference. A-10.

The district court found as a fact that petitioner was better qualified than Roberts because of petitioner's practical work experience, which the accounting lab was intended to provide, and because of Roberts' lack of such experience. This finding was based in part on respondent's having defined the

qualifications for the position alternatively, either in terms of academic qualifications or equivalent work experience. A-9-10.

Respondent asserted at trial that Roberts had been selected because of superior academic qualifications. The district court found that this articulated reason was pretextual and that petitioner had satisfied the burden of disproving respondent's articulated reason as the reason for the selection. The district court relied on a number of subsidiary facts in arriving at this conclusion, including: (1) respondent's having selected other lab instructors based on factors other than academic qualifications and having allowed lab instructors to update academic skills after being placed on the job; (2) Travis' willingness to modify his

explanation for selecting Roberts, in order to conform to the expectations of the respondent's personnel officer; (3) the respondent's having initially recommended petitioner for the position and never explaining the withdrawal of the recommendation; (4) respondent's having defined the job qualifications either in terms of experience or academic background. A-23-24. The articulated explanation having been proved not to be the true reason for respondent's action, the district court held that petitioner was entitled to judgment, under Texas Department of Community Affairs v Burdine, 450 U.S. 248 (1981).

The facts, as found by the district court and recited above were not disturbed by the Court of Appeals, and

the Court of Appeals made no contention that they were clearly erroneous. Instead, the Court of Appeals, focusing on the applicants' academic qualifications,[3] held that the finding of fact that petitioner was better qualified than Roberts was clearly erroneous, and made its own finding that Roberts was better qualified.

In so holding, it did not discuss the evidence which supported the finding of fact that petitioner's long years of practical experience overrode Roberts' academic qualifications, as well as the

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[3] The Court of Appeals also referred to petitioner's testimony in her deposition which it says demonstrates that she did not understand double-entry accounting. A-44. There was no evidence that the respondent ever considered any such evidence when the decision was made or even that any such inquiry had been made at that time.

uncontradicted evidence that respondent itself would consider work experience as equivalent to a two-year academic degree.[4/]

The Court of Appeals then further held that its determination that petitioner was not the best qualified dispelled any inference of discrimination and that the ultimate finding that the decision was illegally motivated was likewise clearly erroneous. The Court of Appeals therefore ordered that judgment be entered for respondent.

4/ At the time Roberts was selected for the position, she had not even received her associate degree and hence did not meet the respondent's stated minimum qualifications.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ in order to clarify the role of the federal courts and the scope of the inquiry in reviewing employment decisions where there is a claim that a decision was discriminatory. In holding that the employer was entitled to judgment solely because of the finding of fact that the white applicant was better qualified, the Court of Appeals ignored the real factual issue of whether the decision was the product of illegal discrimination, regardless of who was better qualified. The Court failed to acknowledge the possibility that, regardless of qualifications, some other factor was the true reason for the decision. The decisions conflicts with Texas Department of Community Affairs v. Burdine, supra, and with decisions of

other Courts of Appeals which have correctly recognized that, while qualifications must be considered in making the ultimate factual determination, they are not necessarily dispositive.

Because of the large number of employment discrimination cases which now confront the federal courts, this case presents overriding issues in defining how the lower courts should resolve the ultimate factual issue of whether there was an illegal discriminatory motive. The Court should grant the writ to refine the holding in Burdine that discrimination can be proven by showing that an employer did not act for the reason that it claims. Granting the writ will allow the Court to clarify the role that the question of

qualifications plays in making the ultimate factual determination of discrimination and to resolve the conflict among the circuits as to whether qualifications alone can furnish the basis for resolving issue of discrimination.

The Court should also grant the writ because the Court of Appeals has exceeded the scope of its appellate review by appropriating to itself fact-finding functions which are reserved to the district courts, in conflict with Pullman-Standard v. Swint, ___ U.S. ___, 50 L.W. 4425 (1982).

This case presents important questions relating to the roles of the district courts and the Courts of Appeals in resolving disputed factual issues. In order to allocate properly these functions under Rule 52, and in

order to refine and clarify the holding in Swint, this Court should review the manner in which the Court of Appeals found the district court's findings of fact to be clearly erroneous.

The Court of Appeals has made findings of fact based on its independent review of the evidence, rather than limiting its review to an examination of the specific factual findings by the district court. It also failed to remand to the district court for determining ultimate issues of fact and instead made its own determination of ultimate factual issues.

I.
THE DECISION BELOW CONFLICTS WITH TEXAS DEPT. OF COMMUNITY AFFAIRS V. BURDINE AND WITH DECISIONS OF OTHER COURTS OF APPEALS IN MAKING QUALIFICATIONS DETERMINATIVE OF DISCRIMINATION

After finding that Roberts was

better qualified than petitioner, the Court of Appeals went on to resolve the ultimate factual issue of discriminatory motive solely on the basis of the applicants' qualifications. It concluded that superior qualifications alone could resolve the factual question of whether respondent's decision was motivated by discrimination.

The Court should grant certiorari to resolve the conflict between this decision and decisions of the Courts of Appeals for the District of Columbia and the Second Circuits. These two courts have held, consistently with Burdine, that qualifications are obviously one factor in resolving the factual issue, but they are not necessarily the dispositive issue.

In St. Peter v. Secretary of the

Army, 659 F.2d 1133 (D.C.Cir. 1981), cert. den. 50 L.W. 3765 (1982), the Court of Appeals affirmed the district court's finding that the plaintiff possessed qualifications superior to those of the male who was ultimately selected, but it also affirmed the finding that, notwithstanding her superior qualifications, the failure to select the plaintiff was for reasons other than illegal sex discrimination.[5/]

The Court in St. Peter recognized that, no matter how bizarre such a

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5/ St Peter was brought under § 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16, rather than under 42 U.S.C. § 1981. Nonetheless, the order of proof in cases decided by this Court under Title VII are equally applicable to claims of disparate treatment under § 1981. See General Building Contractors Ass'n v. Pennsylvania, ____ U.S. ____, 50 L.W. 4975 (1982)

situation might appear in terms of rational personnel practices, where the employer's practices result in selection of the less qualified applicant, superior qualifications did not necessarily resolve the issue of illegal discrimination. In his concurring opinion, Judge Mikva stated:

> Employers usually act in their own best interest, and it is somewhat incongruous to find that the employer chose a less-qualified man, rather than a more-qualified woman, but did not do so for discriminatory reasons. Although it may be difficult to convince a trier of fact that an employer selected a less qualified person for a non-discriminatory reason, such behavior is not actionable.

659 F.2d at 1139.

The Second Circuit adopted the same standard in Lieberman v. Gant, 630 F.2d 60 (2nd Cir. 1980):

> Title VII does not require that the candidate whom a court consider most qualified for a particular position be awarded that position; it

> requires only that the decision among candidates not be discriminatory. When a decision to hire, promote or grant tenure to one person than another is reasonably attributable to an honest even though partially subjective evaluation of their qualifications, no inference of discrimination can be drawn.

The decision here reaches the opposite conclusion, and finds that proof of superior qualifications dissipates any inference of discrimination and holds as a matter of law that no discrimination existed, regardless of the employer's true motive.

St. Peter and Lieberman correctly apply Burdine, which recognizes that the appropriate inquiry in an employment discrimination case is directed at the employer's motive and not to which applicant is better qualified. While qualifications is obviously an important factor in making such a determination,

it is not necessarily dispositive. The district court must resolve a factual dispute. Simply stated, it must determine whether the employer's articulated explanation of superior qualification is the true explanation. If the respondent acted for some reason other than its articulated reason, the applicants' qualifications are meaningless, and petitioner is, under Burdine, entitled to judgment, regardless of the absolute qualifications of the applicants. See Burdine:

> The fact that a court may think that an employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination.

This case presents important questions in the administration of the

federal employment discrimination statutes, including Title VII as well as § 1981. It raises questions about scope of review allowed by Burdine and, furnishes authority for the federal courts to determine, not the question of discriminatory motive, but of relative qualifications.

II.
THE DECISION CONFLICTS WITH PULLMAN-STANDARD V. SWINT

Rule 52, F.R.Civ.P., reserves to the district court, in non-jury cases, the fact-finding function and allows the Court of Appeals to reverse those findings only where they are clearly erroneous. This case presents important questions about the administration of that rule and about the allocation of the fact-finding function between the district courts and the Courts of Appeals which should be resolved by this

Court.

Pullman-Standard v. Swint prescribed guidelines for invoking the clearly erroneous rule in determining issues of intent and motivation in employment discrimination cases. The Court of Appeals made no reference to Swint, and there is no attempt in the opinion to comply with its directives.

The Court should grant the writ to determine the extent to which the Court of Appeals must examine the subsidiary findings of fact which underlie the ultimate findings of the district court found to be clearly erroneous.

Swint requires the Court of Appeals to focus on the evidentiary basis for the particular finding of the district court which is said to be clearly erroneous, and directs the Court of Appeals not to substitute its own

independent judgment of the facts. The decision below, instead of examining the evidentiary basis for the district court's findings, focuses solely on the applicants' academic qualifications. It minimizes petitioner's work experience, which the district court, relying on respondent's own definition of qualifications, relied upon in finding that petitioner was better qualified than Roberts. The Court of Appeals did not identify or discuss any evidentiary basis for holding that the district court's finding that petitioner's qualifications, defined in terms of work experience, were superior to Roberts' academic qualifications. Nor did it point to any of the numerous subsidiary findings of fact which supported the finding that petitioner was better

qualified.

The Court should grant the writ to determine whether this summary treatment of the district court's detailed findings of fact complies with Rule 52 and with Swint.

The decision further conflicts with Swint by appropriating to itself an issue of fact which Swint explicitly reserves to the district court, i.e., the ultimate issue of intent. The question presented under both Title VII and § 1981 is one of the employer's intent and not of qualifications. In determining as a matter of law that there was no discrimination, based on a comparison of the applicants' qualifications, the Court of Appeals has made a finding of fact which properly belongs to the district court.

Swint directs that, where the

district court's decision is premised on clearly erroneous facts the Court of Appeals should remand the case for further factual findings. The district court should in the first instance be allowed to make findings as to whether qualifications furnished the true motive for the action, regardless of which applicant was better qualified in some absolute sense.

The Court of Appeals has appropriated to itself the fact-finding function, a function reserved to the district court, which has the opportunity to hear the evidence first-hand and to make findings of facts based on its observation and ability to make credibility resolutions.

As discussed above, qualifications are not necessarily ultimately

dispositive of the question of whether there has been illegal discrimination. A finding that Roberts was better qualified does not necessarily resolve the question of whether that petitioner was a victim of racial discrimination, particularly under the facts of this case. Indeed, the fact that petitioner was initially selected for the position. She was entitled to a preference over Roberts as a result of her status as an incumbent employee. These factors must be considered in determining whether the respondent's articulated explanation was pretextual. Swint requires a remand to the district court to make additional findings of fact.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the

judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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